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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 913

NAPOLEON PERSONE ZAMORA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE
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October Term, 1966

No. _____

NAPOLEON PERSONE ZAMORA,

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vs.

UNITED STATES OF AMERICA,

Respondent.

REVIEW ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment and opinion of the United States Court of Appeals, Tenth Circuit, reported at _____ F. 2d _____ (not yet reported), is printed and

annexed hereto as Appendix A. The judgment appears at Tr. 4. References to the 41 page Record are herein designated as "R," to the 799 page Transcript as "T," and to the 5 page Transcript of Record as "Tr."

JURISDICTION

The judgment and opinion of the United States Court of Appeals, Tenth Circuit, was delivered and entered on December 1, 1966. (Appendix A, hereto) Petitioner's Motion for Stay of Mandate was granted by the United States Court of Appeals, Tenth Circuit, pending application for Writ of Certiorari to this Court on December 15, 1966. The jurisdiction of this Court to review by Writ of Certiorari a final judgment of a cause in a court of appeals is conferred by 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The questions presented are whether the decision and judgment of the United States Court of Appeals, Tenth Circuit, erroneously failed to reverse the conviction of petitioner in Cause No. 22279 on the criminal docket of the United States District Court for the District of New Mexico in eleven Counts of violating the National Banking Laws by making of false entries and embezzlement, on the following grounds:

I. The admission of evidence of purported criminal acts of petitioner other than those charged in the indictment was prejudicial error?

II. The introduction of petitioner's "self-incriminatory" statements was reversible error because:

A. petitioner was not promptly brought

before a United States Commissioner?

B. petitioner's "self-incriminatory" statements were elicited and taken in violation of his right to counsel.

III. The purported admissions and confessions were not sufficiently corroborated by independent evidence.

IV. According to the uncontroverted exculpatory matter introduced by respondent or testified to by its witnesses, petitioner is entitled to acquittal as to each and every count.

STATUTES INVOLVED

The two statutes, the violation of which petitioner was purportedly convicted, provide in material part:

18 U.S.C. 1005:

> "Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, ...
>
> "...makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal "Deposit Insurance Corporation, or any agent or examiner appointed to examine

the affairs of such bank, or the Board of Governors of the Federal Reserve System--

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. 656:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, ...embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both;...."

STATEMENT OF THE CASE

On April 8, 1965, a criminal complaint was filed against petitioner by respondent for a purported single offense consisting of making a false entry on the books of the First National Bank of Santa Rosa, New Mexico, (hereinafter called "the Bank") in violation of 18 U.S.C. 1005 (R. 41). Said purported offense allegedly occurred on April 5, 1965, and involved a discrepancy of $3,000 (R. 41).

On June 21, 1965 an indictment was returned against petitioner in said Cause No. 22279, accusing petitioner in eleven County of various crimes (R. 1-7). Counts I through VIII accused

petitioner, while an officer and employee of the Bank, of making and causing to be made false entries on the General Ledger of the Bank willfully, knowingly, and with the intent to injure and defraud the Bank, in violation of 18 U.S.C. 1005, on eight separate occasions between January 28, 1964 and April 5, 1965 (R. 1-5). Counts IX through XI accused petitioner of embezzling funds and credits of the Bank willfully, knowingly, and with intent to injure and defraud the Bank in violation of 18 U.S.C. 656, on three separate other occasions between May 5, 1964 and February 13, 1965 (R. 5-7). (18 U.S.C. 656 prohibits the embezzlement of "money, funds or credits." Only "funds and credits" were charged in the indictment (R. 5-7). Also, said section prohibits embezzlement of property "of such bank" and that "intrusted to the custody and care of such bank." Only the former was charged.) Each of said eleven Counts involves a certain sum of money or discrepancy totaling $38,000.00 in the aggregate and in each case it is alleged that the Bank's deposits were then and there insured by the F.D.I.C. (R. 1-7).

After petitioner was arraigned and plead "not guilty" to each and every Count of the indictment (T. 2-6), he filed his Motion to Quash and Dismiss the Indictment (R. 8) with supporting affidavits (R. 11-14) contending in part that said indictment was obtained by and as a result of a purported confession illegally obtained from petitioner by respondent in violation of his rights guaranteed by the Constitution and laws of the United States (T. 8). In his affidavit, petitioner stated that the said purported confessions were taken against his will and that at no time prior to making said statements did he consult with an

attorney or was he otherwise aware of his legal rights (R. 11). After this motion was denied (R. 16), the cause came on for trial on August 10, 1965 and continued until August 13, 1965 (T. 7-791), at which time the jury returned a verdict of guilty on each and every Count as charged in the indictment (R. 22).

Petitioner submits that this is a case where the prosecution introduced voluminous and confusing evidence, but the only purported evidence, if any, tending to show appellant committed any crime, was certain purported confessions and admissions, each of which were proven false by prosecution evidence and witnesses in almost every material aspect, and which were elicited and written by F. B. I. agents while petitioner was without counsel, in a secret proceeding, and in a manner totally inconsistent with federal law and petitioner's constitutionally guaranteed rights.

Respondent attempted to prove that petitioner made false entries and embezzled "funds and credits" by attempting to prove petitioner had done so by the following four-step method:

(1) Petitioner credited sums to the checking account of the City Food Market, a grocery store in which petitioner had an interest, or to his personal account, which reflected a cash deposit to said account which was never in fact deposited. (Although respondent introduced evidence that petitioner had access to and custody of the cash (T. 175, 176, 298), respondent did not appear to contend that petitioner ever caused irregularities by any method other than by the making of unsupported deposits, such as the

removal of cash from the Bank; in fact, respondent's witness, Special Agent Carlton, testified that petitioner told him this was not the case (T. 540, 560). Respondent did introduce evidence that if irregularities occurred, it could have been accomplished through the outright removal of cash, and as to petitioner, this was consistent with the uncontroverted documents of the Bank introduced by respondent (T. 67-68, 380, 386, 395, 576). In fact, at least insofar as petitioner is concerned, the only method consistent with said uncontroverted documents by which he could have caused any irregularities was by removing cash, some, but not all of which he could have later redeposited to his account. That petitioner did this seems highly unlikely, since he could much more easily have made direct deposits to his accounts such as in the manner he purportedly confessed to. Furthermore, there was no substantial evidence that petitioner ever removed any cash from the Bank; in fact, in the embezzlement Counts, petitioner was not charged with embezzling "money" but only "funds and credits." (R. 5-7))

(2) To cover up these unsupported deposits, petitioner then made "complementing" machine entries on the proof tapes which reduced the "cash in" (amount of cash received by the Bank) and "demand deposits" (sums deposited in checking accounts) totals for the dates said unsupported deposits were made. The proof tapes reflect each transaction of the Bank for the two accounts (T. 41, 45). These "complementing" entries would have to be made the same day as the unsupported deposits, since they would have to be, under respondent's theory, for the purpose of counteracting the effect of said deposits on the

daily totals, and causing the actual cash in the Bank to balance with the figure shown therefor in the cash journal. (According to Carlton's testimony, it was only if the cash journal reflected the actual amount of cash in the Bank or under the Bank's control that a conclusion of shortage could be reached (T. 380-6, 395). As Eastland testified, the cash need not be withdrawn on the day of the irregularity under respondent's theory; all that was necessary was for the sum to be out of the control of the Bank, such as by having a balance showing in petitioner's account ready for and subject to withdrawal (T. 67-68). However, the "complementing" entries would have to be made on the same date as the unsupported deposits in order to accomplish the result respondent claimed petitioner performed; namely, to record a deposit to his account without the General Ledger control account so indicating and without having the cash journal reflecting an increase in cash.)

(3) The "complementing" entries caused the General Ledger control account for demand deposits to show a false entry, which understated the demand deposits by the amount of the "complementing" entry. The General Ledger account reflects the total of the individual checking accounts in the Bank (T. 16, 36).

(4) In order to cause the "demand deposit" total of the proof recap sheet, which is taken from the proof tape (T. 27), and which is the only figure that is used for comparison purposes the following day (T. 387), to balance the following day with the total posted to the individuals' demand deposit accounts, petitioner made a handwritten change on the proof recap increasing the demand deposit figure.

Attempting to prove the first step, that petitioner had made the unsupported deposits, respondent introduced evidence that petitioner had, for 19 consecutive years preceding April 8, 1965 been employed by the Bank (T. 26), and from January 28, 1964 until April 8, 1965 was so employed as Assistant Cashier or Cashier (T. 26). Petitioner had access to the funds and credits, vault, and records of the Bank (T. 26, 176), as did the other officers, Hauser, Eastland, Serrano and Romero (T. 25, 213, 236, 655), and was in charge of the bookkeeper and teller areas (T. 26). (Hauser and Eastland, who were in charge of the Bank when they were there, were only employed by the Bank part of the time herein involved (T. 25, 193, 197-9). Hauser died on May 20, 1964 (T. 197). Petitioner was also in charge of the Bank for several months; however, no shortages arose during this period (T. 193-7).) Respondent did not present evidence that Serrano, Romero, or others who might have had access to said funds, credits, vault and records, had not caused any irregularities, assuming any existed. No one testified that they ever saw petitioner remove money, funds, or credits of the Bank, or make unsupported deposits. Although it was shown that petitioner was in the Bank actively engaged in Bank business on the dates in question (T. 117-130), it was not shown that he was in the Bank at the times of the day the "complementing" entries were made on the proof machine (T. 402). Petitioner did take vacations (T. 211), and was neither the first person to arrive in the morning nor the last to leave in the evening (T. 211, 213, 279).

The only substantial evidence, if any, in any way indicating petitioner made any unsupported deposits to his accounts were his various purported

confessions and admissions, including Exhibits 91 and 92. These statements are so patently false on their face that little value can be ascribed to them. In Exhibit 92, petitioner purportedly confessed:

> "About twelve years ago I began converting funds of the bank to my own use by putting deposit tickets to my accounts for amounts which I failed to deposit."

The documentary evidence introduced by respondent proved beyond a shadow of a doubt that, as to each and every Count charged in the indictment, this was not true and could not have happened in the same amounts as so charged, or for which the "complements" were made. In not one instance was the cash or "unsupported" part of petitioner's deposit equal to or greater than the amount purportedly converted on said day, or for which the "complements" were made (T. 403, 561, Exhibits 4-5, 8-26). Thus, although if respondent's theory that petitioner caused irregularities by this method be true, petitioner would have had to have made these unsupported entries on the days charged in the indictment, when the "complements" appear; this was proved to be untrue for every single Count charged in the indictment.

In Exhibit 91, petitioner purportedly confessed:

> "During the day of 4-5-65 I placed a deposit slip, without cash or check, in the work of one of the tellers. This deposit slip was to my grocery store account and in the amount of something over $3,000.00. I had put some good checks to deposit on my account plus a $3,000.00 amount which

"was not supported by cash or checks. This in effect gave my store account an additional $3,000.00."

Again, respondent's documentary evidence proved this statement untrue; showed that petitioner had made a cash deposit of only $2,530.00 on April 5, 1965 (T. 403); and it would have been impossible for petitioner to have committed the offense in the manner contended by respondent and purportedly confessed to by petitioner.

Thus, these purported confessions, handwritten by F.B.I. Special Agents Smith and Carlton, signed by petitioner prior to consulting with an attorney, and otherwise improperly taken (discussed infra), were not only uncorroborated by any substantial evidence, but were affirmatively shown to be untrue by records of the Bank introduced by respondent.

In attempting to prove the second step, that petitioner had made the "complementing" entries on the proof tapes, respondent introduced evidence that consecutive "complementing" entries were for each of the days in question (Exhibits 5, 10, 13, 16, 19, 22, 25, 28, 30, 33 and 36; T. 90) and petitioner knew how to operate the proof machine (T. 42, 298, 659). However, the proof machine was normally operated by female employees (T. 42, 84, 209) and were not in petitioner's custody (T. 242), everyone had access to the machine (T. 213), and the subtotaling and totaling, during which most of the "complementing" entries appeared (T. 62, 250) was usually done by Mr. Serrano (T. 237, 656-9), who had been in the Bank over ten years (T. 199) but was not called as a witness. Although petitioner usually went to the machine to get his

daily cash totals, he was not ever seen at the machine on April 5, 1965 (T. 198). No one ever saw him make any "complementing" entries such as those in question (T. 242), nor did anyone ever even see petitioner make any entries while the subtotaling and totaling was being done (T. 659), interrupt anyone at any time while the machine was being operated, interfere with or direct the making of subtotals or complements (T. 255), or make or ask anyone to make an improper entry of any kind (T. 315-16, 655-56). Thus, there was no substantial evidence that he ever had even an opportunity to make entries on the proof machine when no one else was present; yet there was no evidence that anyone ever saw him make a "complementing" entry such as was herein involved. Most important, respondent's chief witness from the Bank, Mr. Eastland, testified he did not know who made these "complementing" entries (T. 242), but particularly as to April 5, 1965, it is doubtful that petitioner did (T. 276-77).

The purported confession, Exhibit 91, is totally inconsistent with petitioner's having made the "complementing" entries, in that part of said exhibit which reads:

> "The proof tape for the bank is not posted until the following morning. Therefore, the total of the proof tape showed deposits received on 4/5/65 of $3,000.00 more than actually received."

If the proof tape showed deposits received at $3,000.00 more than what they actually were, then, obviously, no "complementing" (reducing) entries were made by petitioner (or anyone else) prior to the transcription of the totals from the

proof tape to the proof recap; yet Exhibit 5 shows such a complement was made. Again, petitioner confessed to something the Bank's documents introduced by respondent proved was false and could not have occurred.

As to this second step, then, the only substantial evidence introduced by respondent was that petitioner had limited access to and knowledge of how to operate the machine (this was also true as to all other officers and many employees of the Bank), and that these entries were made. Petitioner's purported confession is inconsistent with his making of these entries, and all other evidence indicates petitioner did not make them and did not know of them. Respondent did not introduce any evidence that the Bank's other employees who had access to and made entries upon the machine did not make these "complementing" entries.

Perhaps most important, R. W. Eastland, Executive Vice President of the Bank, testified that all the documents introduced, including the proof tapes, proof recaps, General Ledger cards, deposit slips and adding machine tapes, did not necessarily indicate irregularities or stealing had occurred, but in fact were as consistent with no shortage occurring as otherwise, and the suspicious entries could be merely innocent corrections or other entries (T. 275, 243, 258, 267-271). Carlton appeared to agree, at least as to one date (T. 607). (On direct, Eastland appeared to testify there was a shortage (T. 67). However, in light of the above testimony on cross-examination, it is apparent that the documents indicate that money was out of the Bank's control if, but only if, the "complementing" entries were fraudulent. The same is true

as to Agent Carlton's testimony (T. 380,395.) Thus, there was no showing that the entries in question were even erroneous, or, if any error was caused by the "complementing" entries, said error was not an innocent error. To the contrary, it was shown the Bank still had an unexplained overage on its books (T.661,662), and other unexplained errors arose, even on the dates in question (T. 229, 285, 287, 400).

As to the third step, that the "complementing" entries caused a false entry on the General Ledger, respondent proved that the amounts posted to said Ledger were derived from the proof machine (T. 37, 38, 63, 658). Miss Romero kept the General Ledger (T. 655).

In attempting to prove the fourth step, that petitioner had made the handwritten alterations on the proof recaps, respondent showed that the demand deposit figure of said recaps had been increased by the amount of the "complementing" entry on the proof tape for the day (Exhibits 4, 9, 12, 15, 18, 21, 24, 27, 29, 32 and 35), did not therefore correctly add up or "foot" (T. 57), and that petitioner and others had access to the sheets. (T. 26, 200, 660) The total figures posted to the recaps are obtained from the proof machine tickets (T. 241) which were not prepared by petitioner (T. 241).

Petitioner's purported confession, Exhibit 91, reads in part:

> "I have observed a handwritten figure on the proof sheet reflecting total demand deposits received on 4/5/65 in the amount of $109,291.85. This figure has been

"changed by from $112,291.85."

However, since the proof tape of said date, Exhibit 5, showed a total demand deposit of $109,291.85, and the proof sheet figure is transcribed from the proof tape, the original figure on said proof sheet must have been $109,291.85 and Mr. Eastland testified it was (T. 176-7). Thus, if petitioner did decrease the total on the proof recap sheet, he could not have made the "complementing" entry on the proof machine. Further, this decreasing alteration is totally inconsistent with the pattern shown and by which respondent contended the shortage occurred. It would seem likely that when petitioner signed the "confessions", not only did he not know what he was signing, but he did not even know how the crimes, if any, occurred, much less committed them.

Further, said proof recaps were usually prepared by and in the custody of Mr. Serrano (T. 39, 200, 237-240, 656-9), and no one ever saw petitioner make any changes on said sheets (T. 265, 669). Miss Romero, employed by the Bank for twelve years, never even saw petitioner make any entry on the recaps (T. 657, 659). Although Mr. Eastland could recognize petitioner's handwritten figures in the cash journal (T. 156), he could not recognize the handwritten changes on the proof recap sheets as being petitioner's (T. 93, 295-6).

Perhaps most convincing was Mr. Eastland's testimony concerning the morning of April 6, 1965 when he was particularly watching for someone to make a change on the proof recap. An increase was made between 9:00 and 10:00 o'clock that morning. Petitioner's desk is immediately

adjacent to Mr. Eastland's, and Mr. Eastland only observed petitioner, who was in the Bank all that day (T. 33), go once to the vault, where the proof recap was kept. Eastland then checked the sheet, but no change had been made. By 10:00 o'clock, prior to the completion of the bookkeepers' posting to the individual accounts, the increase had been made, although Mr. Eastland did not again observe petitioner return to the vault during this time (T. 33, 177-9, 209, 277-287, 292-3). The recap was decreased back to its original number some time later during the same day (T. 33, 52, 293).

Respondent also introduced various adding machine tapes which were at least partially run by petitioner (Exhibits 7, 51, 52 and 53). One of these tapes, Exhibit 7, was run on April 6, 1965 and was supposed to reflect the total deposits to demand deposit accounts the preceding day (T. 33, 46-48). The total on said tape was approximately $3,000.00 lower than the total of another tape (Exhibits 7A, 67, T. 49-50, 330-334, 482) which re-ran the same figures (T. 50). Assuming that a proper inference could be drawn from this evidence that someone fraudulently had caused a deduction to be made on the former tape without said deduction showing on said tape (T. 51) (although there was no evidence introduced that the machine was working properly, would record a deduction, that the making of such a deduction was not a normal bank function to account for checks withheld, returns, etc.) there was no evidence that petitioner made the "no show" deduction or was present at the machine at all times when the tape was being run. The tape, and another tape of all the checks written on the Bank which were received on April 5, 1965, were run

pursuant to a request of Mr. Eastland made to the girls in the bookkeeping department (T. 33). After the girls in the bookkeeping department started on these tapes, petitioner inquired of Mr. Eastland why the tapes were being run, and petitioner then went to the bookkeeping department and completed the tape on the deposits, sending the girl who was working on it at the time to help out with the tape of the checks (T. 34). Petitioner then brought the tapes to Eastland and said "They were all in balance." (T. 34) Thus, although Eastland testified that Exhibit 7 was "prepared by Mr. Zamora" (T. 47), his own testimony shows that not all, but only some of the tape was prepared by petitioner.

Further, respondent did not prove that, even as to that portion of the tape which petitioner ran, he did not leave the machine during his running of said portion, or that no one else had access to his machine during said time. (Respondent necessarily contended that petitioner made the "complementing" entries in question. In order to do so, petitioner would have had to "sneak in" these entries (assuming this was possible), since someone else was operating or in charge of the machine at the time. The exact same circumstances, however, would allow a person other than petitioner to make the subtraction on the adding machine. Since other persons ran part of Exhibit 7, the likelihood of a "sneak entry" by one other than petitioner is much greater.) Although there was no testimony that anyone saw petitioner make these "no show" deductions, respondent introduced no proof that petitioner was alone at any time during the running of the tapes. Thus, at most, respondent proved that petitioner or someone else fraudulently made a "no show" deduction on this tape. Since other persons ran part

of the adding machine tape (T. 34), and, as discussed supra, petitioner probably did not make the "complementing" entries on the proof tapes, or hand-written changes on the proof recaps, and it was not proved he did, it is most reasonable to believe that a person other than petitioner also made the "no show" deduction on the adding machine tape. Although the other Bank employees were readily available (Mr. Serrano was in Santa Rosa, in charge of the Bank, at the time of trial (T. 657)), respondent did not even present any evidence that said employees did not make this "no show" deduction or that petitioner was ever alone at the machine.

Respondent further introduced three other adding machine tapes (Exhibits 51, 52, 53), purportedly totaling the balance in the individual demand deposit accounts for January, February, and March, 1965, respectively, for the trial balances of said months. Said tapes were supposed to balance with the General Ledger control account, and the inference probably could be drawn that someone had fraudulently made "no show" deductions on said tapes in the amounts of $248,400 for January, $252,400 for February, and $254,400 for March. (Only $38,000.00 was charged in the indictment, T. 406-418). However, the same matters relevant to the April 5, 1965 tape (Exhibit 7) are relevant to these tapes, and respondent similarly proved, at most, that either petitioner or someone else made a "no show" fraudulent subtraction on said tapes, particularly since the tapes were in two pieces (T. 160-173). In addition, handwriting of other than petitioner was on some of said tapes (Exhibits 51, 52, 53, T. 161, 164), and it was not shown that the Bank had a shortage in the large sums reflected by the discrepancies in said tapes,

or said amounts had anything to do with the amounts charged in the indictment.

Respondent also introduced the cash journal for each of the days in question, which was usually kept by petitioner (Exhibit 50, T. 298). On each of the days in question, the closing cash balance, as reflected by said journal, was less than the total of the starting cash balance, as shown by said journal, plus the net cash increase for the day as reflected by adding machine tapes run off the proof tape (Exhibits 54-64, T. 300-310), but not taking into account the deduction reflected by the "complementing" entry (T. 335-404). However, if said "complementing" entries were proper, as Mr. Eastland said they could well be, the cash journal figures would properly reflect the legitimate cash position of the Bank (T. 556-7). The figures in the cash journal were not checked daily against the actual cash in the vault (T. 246). Actually, according to respondent's theory of the case, the cash journal kept by petitioner at all times correctly reflected the cash in the Bank, or under its control.

The figures petitioner placed in the cash journal were taken from the figures submitted to him by the tellers at each of the windows (T. 247). There was no evidence of any discrepancies in the tellers' figures and what petitioner entered in the cash journal, that petitioner or anyone else tampered with said tellers' figures, or that petitioner made any errors in accounting for the cash in the safe (T. 247). To the contrary, it was shown that although there were many alterations and complements on the Bank records not kept by or in the custody of petitioner, there were very few changes on the cash journal which he

kept and had custody of and none of his changes indicated any irregularity (T. 243-248).

Respondent also showed that on or near four of the dates in question, as previously set out supra, petitioner wrote checks for relatively large amounts, and on three of said dates, deposited relatively large amounts of cash in his grocery store account. One of these occasions dealt with his buying of an automobile as a graduation present for his son (T. 318-321), which car had been ordered four to five weeks previous thereto (T. 323). In none of these four cases, however, did the "unsupported by checks" or cash portion of said deposit equal or even approximate the amount of the purported irregularity for said date, but in all cases it was substantially lower. No evidence was introduced that indicated total cash deposits from the store were not in the actual amounts indicated. On the remaining seven instances, there were neither large checks nor large deposits on the days in question (T. 403, 561, Exhibits 4, 5, 8-36). Yet, respondent contended that on the days in question, if any crime occurred, a corresponding amount was credited to an account of petitioner without a supporting deposit therefor. The documents introduced by respondent conclusively show that petitioner did not credit the amounts in question to his account. Thus, the evidence introduced by respondent not only does not afford substantial evidence that petitioner caused any of the irregularities charged, but affirmatively proves that he could not have done so.

Respondent introduced no evidence that petitioner spent large amounts of cash, but, to the contrary, petitioner made his purchases by check (T. 322, 666). Petitioner and his family ran

a grocery store, and would keep relatively large amounts of cash on hand. When the occasion for a large expenditure or investment would arise, this cash on hand would be deposited and a check written for the purchase. This was done on the three occasions in question when large deposits were made (T. 666-670). Petitioner borrowed money from the Bank (T. 624-25).

Finally, respondent proved that petitioner had a nice home (T. 682-683), and other assets, mainly consisting of an interest in a grocery store (T. 131, 200, 210, 322), a small ranch or farm (T. 210, 681), and a small trailer court (T. 667). However, petitioner, in addition to his Bank salary, made a good income from said grocery store, in which his wife worked seven days a week and his children worked part-time (T. 663-4), and had some income from his other assets (T. 667). Many of his assets were bought through time payments or loans (T. 674-5).

Respondent also introduced a certificate from the F.D.I.C. (Exhibit 1) which was "controlling" on August 10, 1965 and issued on September 21, 1950 (T. 27-29), testimony that these are only reissued when a change in the coverage occurs, and evidence that the Bank was a national bank pursuant to a charter from the Treasury Department (Exhibit 2) which was issued on October 10, 1922 and was "in existence" on August 10, 1965 (T. 30-21).

On the basis of the foregoing evidence and, apparently, mainly on the basis of the purported confessions and admission of petitioner, the jury verdict of guilty was returned.

As to said purported confessions and admissions, the testimony was that prior to petitioner's return from lunch on April 8, 1965, F.B.I. Special Agents Smith, Carlton, and Norton had been investigating reported irregularities at the Bank, and had been shown various items, including an adding machine tape of demand deposit accounts which showed a "considerable difference" from the General Ledger control account (T. 327, 584-6), and Exhibit 7 (the "doctored" April 5, 1965 adding machine tape) which they were told was entirely run by petitioner (T. 330, 334, 482). (No investigation was ever made as to whether petitioner ran the entire tape (T. 334), or whether the "complementing" entries could be a proper or innocent entry (T. 605). No evidence was introduced substantiating what was told to the F.B.I.) Therefore, at all material times on this date, petitioner was the prime suspect, and was believed to be involved in the irregularities herein alleged even prior to his arrest (T. 427, 444, 567, 570). Shortly after 2:00 p.m. on said date, petitioner returned to the Bank from lunch, and was accosted by F.B.I. Special Agent Smith, who introduced himself, disclosed who he was, and "asked" petitioner to accompany him to the Bank's lounge, where two other F.B.I. Special Agents, Carlton and Norton, were waiting (T. 422, 501, 437-9, 456).

The "interview" began at 2:18 p.m., and between 2:18 p.m. and 2:19 p.m. petitioner was advised that the men in the room were Special Agents of the F.B.I. (T. 511, 534, 563). Between 2:19 and 2:20 p.m., petitioner was told that the Agents would like to "talk" to him and would appreciate his cooperation, although petitioner did not have to make a statement, (He was not told he

did not have to answer questions or discuss the matter (T. 565, 569).) no threats, promises or duress would be used; that anything petitioner said could be used against him in Court; and that petitioner had the right to consult with an attorney or anyone else (T. 423, 433, 441, 448-9, 511-514, 535, 563). Petitioner was not then under arrest (T. 442-3), and he was not again so warned or advised of his rights until he was brought before the U.S. Commissioner (T. 443). Immediately after the introduction and warning, but prior to being advised of the nature of the inquiry, petitioner consented to being "interviewed" (T. 433-36, 443-4, 510, 569). Petitioner was then advised of the nature of the investigation and the amount involved (T. 423-4, 427-8). Although petitioner was then considered a prime suspect and believed guilty, he was not so advised, but, to the contrary, petitioner was told they "didn't know whether he was involved" nor "who was responsible" (T. 423, 426, 427, 437). Petitioner was not advised of the penalties involved if he were guilty of causing the purported irregularities, his right to a jury trial, or anything else except as previously mentioned (T. 426, 441, 481-2, 587). Furthermore, the Agents made no inquiry as to whether there was an attorney in Guadalupe County (in which Santa Rosa is located) whom petitioner could consult with (T. 583), and, in fact, there was no resident attorney in said county (T. 613), and petitioner did not consult with an attorney (except the Commissioner) at any time during the day.

The Agents then began questioning petitioner in a manner that not only easily lent itself to, but which was obviously designed for, and for the purpose of, eliciting incriminatory statements (T. 445).

Although Carlton testified the "interview" was also for the purpose of investigating the case, to find out if additional persons were involved, and to develop evidence of any irregularities by anyone in the Bank (T. 445, 482-3), Carlton's description of the "interview," added to the fact that petitioner was the prime and only suspect at the time of said "interview," leaves no doubt as to its nature and purpose. In this regard, Carlton testified:

> "Q. (by Mr. Bigbee) Now, tell me what was stated between 2:20 p.m., and 2:45 p.m., to the best of your recollection.
>
> A: Well, all right.
>
> Only that he first said he didn't know what we were talking about; he must be dreaming; and I showed him these items and told him there was a $3,000 difference in these tapes; also a $3,000 complement or reduction on the proof tape, and that there was a $3,000 irregularity certainly indicated at that time, and who could have done it; did he do it, and so forth. That was the nature of that conversation, at 2:00 -- (T. 430)
>
> A. Well, he was saying at first, that he didn't know what it was, or what it was all about, until 2:45 p.m., and I continued saying that I thought that if he made this tape and had a plug of $3,000 in it, left off, that he must know what I was talking about; that that could not be an accident, and it was verified by the reduction on the proof tape, and on the proof recap sheet which had been changed." (T. 431)

Petitioner first answered the Agents' questions by denying he knew anything of the matters they were talking about, and said, "I must be dreaming." Twenty-seven minutes after the interview began, at 2:45 p.m., petitioner first admitted that he had caused a false entry on the General Ledger for April 5, 1965 (T. 429-31, 535-8).

Petitioner then told the Agents that he had concealed large irregularities from the Bank Examiners by either running for said examiners and altering the tape of balances on the demand deposit ledger cards or removing enough ledger cards to give a total that would balance; that the irregularities had occurred over the past twelve years and were entirely his responsibility; that the amount of said irregularities was $257,400 instead of $264,000 as they had previously been told; that no one else knew of the irregularities, and that the demand deposit control figure was always under the individual ledger balances by the amount of his shortages at the time (T. 535-541). Petitioner further stated that "on the days that he was taking Bank funds, he would deposit it," and that he "never just went into the cash drawer and took cash in his hand out of the Bank," that "whenever he would take funds he would deposit them to his account, and never take money out of the Bank" (T. 540, 560). (Petitioner also told Carlton that he could put a ticket for cash in a teller's work in his absence, without depositing said cash. Carlton added that petitioner did not have to do this on the dates an irregularity was made (T. 576).) Yet, Carlton testified, and the documents introduced by the Bank proved, that this never occurred in connection with a single one of the eleven Counts charged in the indictment, although Carlton

volunteered it did occur on occasions other than those charged in the indictment (T. 560-1, 572, 576-7).

During the "interview" which lasted until 3:12 p.m. (T. 446, 552), the only persons present were petitioner and the three Agents, except for a few minutes when Mr. Eastland brought in some coffee (T. 457, 588), and the doors to the Bank's lounge were closed (T. 441, 445). Throughout the proceedings, petitioner appeared to be "bewildered" (T. 508, 638).

About 3:12 p.m. petitioner told Mr. Eastland that he was "sorry," that this was awful, and asked Eastland to look after his family (T. 184, 191). However, this was said in the same manner as when one apologizes for an innocent error (T. 215-17). Shortly thereafter, at petitioner's request he was taken to his home by Agents Smith and Norton (T. 468, 502, 627). By this time, petitioner had been placed under arrest and was in custody for the remainder of the day (T. 469-70, 543, 629).

Upon petitioner's arrival home, his wife asked him and Agents Smith and Norton what was going on. The Agents told her petitioner might want to talk to her, but when he did not answer, they told her they were investigating an irregularity at the Bank (T. 502-3, 620-21). Petitioner was not, however, warned again as to his constitutional rights (T. 676). There was disputed evidence as to whether petitioner was physically abused during this period (T. 515-16, 521-4, 622-3, 634-637, 671-3, 684-9, 694-703), but, in any case, petitioner was not permitted to speak to his wife alone despite her request. Petitioner did not act

normal nor like himself (T. 507, 521, 541, 635, 640, 671). After making a telephone call to his brother, which the Agents also insisted on overhearing (T. 503, 507, 516, 622), petitioner and said Agents returned to the Bank, arriving at 3:44 (T. 464, 503, 542, 590, 623). It was not until their return from petitioner's home that any attempt was made to contact a United States Commissioner, which was done sometime between 3:44 and 4:02 (T. 542, 593-4), at which time petitioner and the three Agents left for Tucumcari, where the nearest Commissioner resided (T. 465, 503, 542-3, 591, 631). During the trip to Tucumcari, Carlton and Smith, who were alone in a car with petitioner (T. 465), questioned him extensively concerning the general mechanics of the purported irregularities, as to just how the records were manipulated, how things occurred, how long they were going on and whether anyone else was involved. There was quite a bit of talking, Carlton asked petitioner a lot of questions, and petitioner was told by the Agents that they did not believe he had told them everything and he was asked to do so. Petitioner was apparently reluctant to answer questions; he answered some, and to others he replied, "I will tell you later." (T. 466, 471, 473, 504, 506, 516-18, 596, 623, 640-641)

Upon the arrival of petitioner, Carlton and Smith at the office of Commissioner Rowley at 5:20 (T. 544), the complaint, relating solely to April 5, 1965, was prepared, and at 5:26 petitioner's arraignment commenced. Rowley had known petitioner off and on for eighteen years. During the arraignment, Rowley asked petitioner if he had an attorney and said that if he could not afford to hire one, he could have one free of cost,

to which petitioner replied he did not need an attorney, he was guilty, and he had already done everything he could do to anybody. Rowley then advised petitioner his function was not to take a plea, but only to advise him of the charge and his right to an attorney. Rowley then advised petitioner of his right to a preliminary hearing and set bond, to which petitioner replied, "Who would make bond for me?" Petitioner was only advised that a National Banking Act violation was involved, and was not advised of the penalties involved, his right to a jury trial, the elements of the offense, that he should exercise great caution in executing a statement, or anything else except as heretofore stated.

After arraignment, the Agents went into another room to prepare for the taking of written statements and to make arrangements with the jail. Rowley then conversed alone with petitioner for ten or fifteen minutes, placed a call for petitioner to his wife, principally in connection with making bond, and told petitioner that he needed a good lawyer (T. 465, 490-4, 497-8, 545-7, 609-617, 625). Throughout the day's proceedings, although petitioner did not appear to be physically abused, physically or mentally incapacitated, and appeared to know what was going on, he appeared during said time, according to Agent Smith, to be bewildered and confused (Carlton disagreed) and, according to Rowley, like a man in a state of shock (Carlton again disagreed). It was undisputed that petitioner was dejected, upset, "shook" like a man that might have come to the end of the world, surprised, very depressed, and worried (T. 497, 499, 507-8, 577-8, 615, 618, 638, 644).

At 6:00 p.m., petitioner was taken into

another room where only he and the Agents were present. Petitioner was again advised of his rights, but not as to the penalties involved, elements of the offense in question, his right to and the nature of a jury trial, etc. (The effectiveness of this advice, particularly as to his right to speak to anyone he wished, is somewhat doubtful since every time he had tried to speak to someone that day, he was not allowed to do so in private.) Petitioner agreed to sign statements, but not write them, so two statements were then written by the Agents in their own words, Exhibits 91 and 92. After the statements were written, they were read by petitioner, then read out loud to him, and, after initialling corrections, he wrote the last paragraphs himself and at 6:45 p.m. signed the statements. Two statements were taken because the second statement, Exhibit 92, included matters petitioner was not then charged with, and on which there had been no appearance before the Commissioner (T. 465-8, 477, 480-3, 485-8, 545-8, 551-6, 639). Petitioner was taken to jail at 6:55 p.m. (T. 547)

On April 10, 1965 Eastland called petitioner in connection with some work that was being done at the Bank, and asked him if he knew the whereabouts of certain documents (not material to the dates herein involved). Petitioner replied that with all he had done, he had never destroyed any records, and that he was sorry he had caused so much trouble and work. In fact, the documents in question had been ordered destroyed by Mr. Hauser (T. 186, 189, 192).

At the conclusion of the trial, petitioner and respondent requested that various instructions be submitted to the jury, many of which were denied by the trial court, and petitioner objected to many

of the Court's instructions which were submitted to the jury (T. 707-786).

During the trial of said cause, the points herein urged for consideration were preserved for appeal through various objections, exceptions, and motions, including motions for judgment of acquittal and mistrial, all of which were denied (T. 407-410, 460-1, 507-29, 650-54, 692-3, 705-707). On August 18, 1965 petitioner filed his written Motion for Judgment of Acquittal, Or, In the Alternative, For a New Trial (R. 19), and an Order denying said motion was entered on September 2, 1965 (R. 21). The points raised in said motions were substantially those which are herein presented to this Court.

On September 3, 1965 petitioner was sentenced to a term of five years on each and every of said eleven Counts, said sentence to be served as follows: Counts I, II and III concurrently with each other; Counts IV, V and VI concurrently with each other and consecutively to Counts I, II and III; Counts VII, VIII and IX concurrently with each other and consecutively to Counts IV, V and VI; and Counts X and XI concurrently with each other and consecutively to Counts VII, VIII and IX, all subject to 18 U.S.C. 4208(a)(2) (R. 22, T. 794-798), (a total of 20 consecutive years). On the same date, petitioner's Notice of Appeal was filed (R. 23). Thereafter, petitioner filed his Cost Bond on Appeal (R. 24), his Appearance Bond on Appeal (R. 27), and his Designation of Record on Appeal (R. 37). Respondent filed its Designation of Additional Portions of the Record (R. 39), and, after various orders extending the time therefor (R. 33-36), this cause was docketed in the Court of Appeals, Tenth Circuit, on May 16, 1966.

All emphasis herein is supplied, unless otherwise indicated.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR THE ALLOWANCE OF THIS WRIT

I. Evidence of criminal acts other than those charged in the indictment.

The opinion and judgment of the Court of Appeals in this case has decided this federal question in conflict with applicable decisions of this Court and with other Courts of Appeals, and sanctions so far a departure by a lower court as to call for an exercise of this Court's power of supervision.

Throughout the trial herein, respondent repeatedly introduced into evidence, over petitioner's objections, matters relating to purported crimes other than those charged in the indictment, so that petitioner was effectively tried and sentenced for irregularities of $257,400 instead of the $38,000 with which he was charged. This evidence included certain adding machine tapes purporting to show discrepancies of approximately $250,000 and testimony relating thereto (Exhibits 51, 52 and 53, T. 159-173), testimony of Carlton regarding another adding machine tape (not even introduced into evidence) reflecting a $250,000 discrepancy (T. 327), Carlton's testimony that although petitioner's confessions were false as to each and every date charged in the indictment, it was true as to other dates not charged (T. 560), and, perhaps most damaging, petitioner's purported oral and written confessions admitting to causing irregularities of $257,400 over a twelve-year period

(only a two-year period was charged in the indictment) and testimony relating thereto (T. 538-41, 552-56, Exhibit 92).

The only basis for the admission of this evidence by the trial court was as to proving the intent of petitioner as to the acts charged in the indictment. The Court's Instruction No. 18 so stated, and respondent did not object to same (T. 777, 759). Yet, the Court of Appeals herein sustained the admission of this evidence on the basis that

> "This evidence was of other acts of embezzlement in the course of conduct showing a series of related transactions which diverted funds of the bank to Zamora...."

The evidence of crimes other than those charged in the indictment introduced herein was of very little probative value, since there were already before the jury charges of eleven separate offenses within a sixteen-month period, as to all of which respondent introduced basically the same evidence, contending that all eleven alleged offenses occurred in exactly the same manner. Thus, any evidence that petitioner was responsible for other similar crimes of a much greater magnitude than those charged in the indictment was, at most, cumulative of that evidence already introduced, and served no real purpose except to inflame the jury.

Even after extraneous evidence has been determined to be within an exception to the general exclusionary rule, there must be a weighing

process performed, whereby it is determined whether the probative value of the evidence outweighs the evils of this type of evidence. As stated in United States v. Sorrentino, 78 F. Supp. 425 (1948), aff'd. 175 F. 2d 721 (3rd Cir. 1949), cert. den. 388 U.S. 868, 70 S. Ct. 143 (1949):

> "The admissibility of other offenses is determined by deciding whether what it will contribute rationally to a solution of the problem is more than matched by the chance that it will divert the jury from the facts which should control their verdict." (78 F. Supp. at 431)

To the same effect is Lyda v. United States, 321 F. 2d 788 (9th Cir. 1963) where the court reversed a conviction because the prejudicial effect of extraneous evidence outweighed its probative value.

The weighing process required must, of course, be viewed in light of the danger of this sort of testimony. As stated by this Court in Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213 (1948),

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrater of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a

> "particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." (335 U.S. at 475, 476, 69 S.Ct. at 218, 219)

Thus, even if the evidence of crimes other than those charged in the indictment in this cause were otherwise admissible, their slight probative value, coupled with their exceedingly prejudicial and inflamatory nature, render their admission reversible error.

In addition to the foregoing reasons why said evidence should have been excluded, the introduction of some or all of said evidence violated other well established principles of law.

First, said evidence was improperly admitted because it involved purported crimes committed too remote in time to the offenses charged. As stated in Paris v. United States, 260 Fed. 529 (8th Cir. 1919), in reversing a narcotic conviction because evidence was introduced of possession of narcotics nine months prior to the offense in question:

> "...where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the

"law." (260 Fed. at 531)

To the same effect, and clearly in conflict with the instant cause are Boyer v. United States, 132 F. 2d 12 (D. C. App. 1942); and Lloyd v. United States, 226 F. 2d 9 (5th Cir. 1955).

The evidence of purported other crimes was also inadmissible and in conflict with decisions from other Courts of Appeals in that they were not sufficiently similar acts to those charged in the indictment, in that they dealt with crimes committed in a manner other than those charged in the indictment were purportedly committed. See Flood v. United States, 36 F. 2d 444 (9th Cir. 1929); Lyda v. United States, 321 F. 2d 788 (9th Cir. 1963); United States v. Beno, 324 F. 2d 582 (2nd Cir. 1963).

Additionally, the evidence of other crimes should have been excluded because of the failure of any integral connection of said extraneous crimes and those charged, and is thereby in conflict with decisions of the Courts of Appeals for the Ninth Circuit in Erwing v. United States, 296 F. 2d 320 (1961); the Eighth Circuit in Niederluecke v. United States, 21 F. 2d 511 (1927), Kraft v. United States, 238 F. 2d 794 (1956), and Hartman v. United States, 215 F. 2d 386 (1954); and the Third Circuit in Quig v. United States, 33 F. 2d 820 (1929).

It would appear that extreme caution must be exercised as to admission of a defendant's self-incriminatory statements of prior offenses. The decision of the Court of Appeals herein seems in conflict with other decisions excluding this type of evidence. Marshall v. United States, 360 U.S. 310,

79 S. Ct. 1171 (1959); Sang Soon Sur v. United States, 167 F. 2d 431 (9th Cir. 1948); Labiosa v. Government of the Canal Zone, 198 F. 2d 282 (5th Cir. 1952); United States v. Jacangelo, 281 F. 2d 574 (3rd Cir. 1960); and, particularly, Helton v. United States, 221 F. 2d 338 (5th Cir. 1955).

In summary, although petitioner was charged with the commission of eleven crimes over a sixteen-month period involving $38,000, he was effectively tried and convicted for crimes involving $257,400 over a twelve-year period. In the absence of some overwhelming necessity, and unless said evidence properly is included within the intent exception to the general exclusionary rule, the admission of such extraneous evidence is reversible error. There is no such justification or necessity in this case, and the substantial prejudice and detriment to petitioner caused by said evidence dictates reversal herein.

II. Introduction of self-incriminatory statements.

The opinion and judgment of the Court of Appeals in this case has decided this federal question in conflict with applicable decisions of this Court and other Courts of Appeals.

A. Failure to promptly arraign petitioner.

Respondent's witnesses testified that although the petitioner was brought into a closed room with the three F. B. I. agents and "advised" of his right to remain silent at 2:18 p. m. on April 8, 1965, at which time the "interview"

began, petitioner denied any connection with any criminal acts until 2:45 of said date, at which time, after certain trickery, cajoling, prodding and "cross examination" by said agents, certain admissions or confessions were made by petitioner. Although no formal arrest had been made, the petitioner was then the prime and only suspect. Said interrogation was designed and easily lent itself to the purpose of eliciting statements from petitioner of an incriminatory nature and petitioner was not at that time represented by an attorney. Further, said interrogation continued even after petitioner had been placed under arrest, despite petitioner's reluctance to participate. No attempt was made to bring petitioner before a United States Commissioner until after he had made purported self-incriminatory statements, and he was not brought before any United States Commissioner until 5:20 p.m., some three hours after the interrogation began.

Rule 5(a) of the Federal Rules of Civil Procedure provides in material part:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States."

The decision of the Court of Appeals herein is directly in conflict with the opinions of this Court in McNabb v. United States, 318 U.S. 332, 63 S.Ct.

608 (1943); Upshaw v. United States, 335 U.S. 410, 69 S.Ct. 170 (1948); and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356 (1957). The confessions herein involved were not made "promptly and spontaneously" as in United States v. Mitchell, 322 U.S. 65, 64 S.Ct. 896 (1944).

Upshaw appears particularly controlling herein, since the defendant therein, at the time of his questioning, although formally arrested was actually merely a suspect, since there was insufficient evidence at the time "to hold" the defendant.

As stated by this Court in Mallory:

> "Provisions related to Rule 5(a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." (354 U.S. at 453, 77 S.Ct. at 1359)

After stating that a suspect must be arraigned "as quickly as possible," this Court therein said a person,

> "...is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements...." (354 U.S. at 454, 77 S.Ct. at 1359)

Applied to the facts herein, Mallory is conclusive in determining that petitioner was being illegally detained at the time his first purported confessions

were made. Petitioner was not taken to a magistrate "as quickly as possible," but to the contrary, he was questioned extensively after he denied any connection with the purported crimes in question, and said questioning undoubtedly lent itself "to eliciting damaging statements." The admission of said statements into evidence was, therefore, error.

The decision of the Court of Appeals herein is also in conflict with many recent cases of the Court of Appeals for the District of Columbia, including Alston v. United States, 348 F. 2d 72 (1965); Greenwell v. United States, 336 F. 2d 962 (1964); and Spriggs v. United States, 335 F. 2d 283 (1963).

In the instant cause, petitioner was not, at the time he made his initial oral statements, technically under arrest. He was under arrest at the time the oral statements were "coaxed" from him during the automobile trip to Tucumcari. Furthermore, prior to petitioner's signing of the written statements, he had only been arraigned by the Commissioner as to one purported offense, alleged to have occurred on April 5, 1965; yet, Exhibit 92 purportedly goes to many other purported offenses which petitioner was never arraigned for.

All of petitioner's purportedly self-incriminatory statements, oral and written, were clearly obtained in violation of said Rule 5(a), including the oral statements made in the Bank prior to formal arrest. At the time said oral statements were made, petitioner was the only suspect, and was believed to be guilty by said agents at the time in question; yet he was led to believe other-

wise and the agents then attempted to obtain a confession. After a person has been placed under arrest, he is at least alerted to the danger and reality of the situation. Can a person, such as petitioner, who is deliberately deceived into believing he is not suspected of any crimes be entitled to any less protection than one formally arrested?

Obviously, in the instant cause, the agents delayed making a formal arrest to avoid the dictates of said Rule 5(a). Such an evasion of said rule would greatly minimize, if not completely negate, its protections to an accused, particularly in a case such as the instant cause. Furthur, as discussed infra, the rights to counsel of a criminally suspected person attaches at the stage of the proceedings here in question. It is certainly inconsistent to believe that a suspect's right to prompt arraignment does not so attach simultaneously.

B. Violation of petitioner's right to counsel

The Court of Appeals herein impliedly recognized that certain requirements as to confessions as set forth by this Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) were not met; namely, petitioner was not advised of his right to representation by an attorney during questioning, nor was he advised of his right to free counsel if unable to afford counsel. The Court of Appeals herein held these requirements not applicable to petitioner by virtue of Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772. Whatever be the merits of denying application of Miranda to cases finalized prior to the decision, it

is difficult to see how a different rule can apply in Miranda than in the instant cause, particularly when it be considered that if it were not for the many extensions herein necessary for the purpose of preparing the transcript, this cause may well have been decided prior to or simultaneously with Miranda. Petitioner submits that the holding of this Court in Johnson denying application of the Miranda rule to cases already on appeal, as opposed to post-conviction proceedings, is totally inequitable, does not afford equal protection of the laws, and is without legal justification.

Even if the Miranda rule is not applicable to the instant cause, this would only mean that the eliciting of petitioner's statements herein was not in violation of his Fifth Amendment right against self-incrimination. That his Sixth Amendment right to counsel was violated has been established by rulings of this Court prior to the commencement of trial herein.

Petitioner certainly had a right to counsel at the time of the interrogation. Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964).

The only evidence of any waiver of said right to counsel as to the oral statements made by petitioner to the F.B.I. agents at the Bank or in the automobile was the one-minute stock warning given to petitioner by said agents twenty-six minutes prior to any purported self-incriminatory statements were made. As to the written statements, Exhibits 91 and 92, there were additionally the short arraignment before the Commissioner, in which only one purported crime involving $3,000 was mentioned to petitioner, petitioner's private discussion with said Commissioner, and a repeat

of the stock warning by the agents.

Although, as stated in Escobedo, "The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel at a pre-trial state or at the trial," the facts herein involved are insufficient to find a waiver as a matter of law.

The trial court apparently ruled that petitioner was not entitled to an attorney at the time in question, and, therefore, did not rule on whether a waiver occurred, nor submitted the issue to the jury (T. 528-9, 728-32). Respondent apparently contended that said stock warnings were sufficient to constitute waiver. However, when viewed in light of the total circumstances, these stock warnings were of little value. Although petitioner was "advised" he could speak to an attorney, there was not an attorney who resided in the entire county. Further, every time he had tried to speak to someone, including his wife and brother, he was not allowed to do so alone. This deliberate refusal to allow petitioner to speak alone to his wife or brother was not only itself a denial of petitioner's rights, but it may well have caused petitioner to assume that if he did counsel with an attorney, this also would not be in private. An accused is not properly advised of his right to counsel unless it is at least inferred that he may consult with said counsel in private; certainly, he is not properly so advised when it is inferred he may not so consult in private.

Since this Court has but recently recognized that the right to counsel accrues at the stage of the proceedings herein involved, there are no

cases from this Court as to what constitutes waiver of said right at said stages of the proceedings. However, the Court has set forth criteria by which such a waiver must be considered at other critical stages of the proceedings, and it is illogical to suppose that a waiver may be more easily effected before F. B. I. agents during a secret interrogation than before an impartial judicial magistrate. See Escobedo v. State of Illinois, supra, particularly footnote 14 therein at 378 U.S. 490, 84 S.Ct. at 1765.

In Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316 (1948), this Court granted a writ of habeas corpus because the petitioner had entered a plea of guilty before the district judge without benefit of counsel. In discussing what constitutes an intelligent and competent waiver of the right to counsel, the Court held that merely because the accused states he desires to waive counsel is not sufficient to constitute waiver, but that,

> "To be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." (332 U.S. at 724, 68 S.Ct. at 323)

As admitted by the F. B. I. agents, petitioner was not advised of these matters prior to the interrogation of him. Is the petitioner entitled to any less protection before these agents than he would be afforded before a judge? If so, the right to

counsel as guaranteed by the Constitution is rendered virtually nugatory, particularly in a case such as petitioner's.

Also illuminating on the question of waiver of counsel are Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 69 S.Ct. 184 (1948) and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938).

The mere fact that petitioner was advised of his right to counsel by Commissioner Rowley did not render the confessions made thereafter admissible. Not only did the Commissioner's advice to petitioner as to his rights fall far short of that which would give rise to a valid waiver, but petitioner was only advised as to the one purported crime of April 5, 1965.

The decision of the Court of Appeals herein is also in conflict with Queen v. United States, 335 F. 2d 297 (D.C.App. 1964). See also People v. Modesto, 42 Cal.Rptr. 417, 398 P. 2d 753 (1965).

In summary, particularly since "every reasonable presumption is indulged against" the waiver of counsel, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942), there was no such waiver in the instant cause.

III. Insufficient corroboration of confessions by independent evidence.

The opinion and judgment of the Court of Appeals in this case has decided this federal question in conflict with applicable decisions of this Court.

In his purported confessions and admissions, petitioner stated that he caused irregularities at the Bank by the following method:

1. He made an unsupported deposit to his account.

2. He then made false entries on the books so they would reconcile in a certain manner.

This was proved untrue by the undisputed documents and witnesses of respondent (Exhibits 4,5, 8-36, T. 134, 136, 141, 155, 370, 392, 403, 558-9, 561, 572).

The independent evidence introduced to purportedly corroborate said statements not only completely failed to do so, and, in fact, totally contradicted them, but said independent evidence did not even tend to establish that a crime had been committed.

Petitioner submits that this is not a case which falls into the problem area of whether corroboration was sufficient; rather, this is an extreme instance of the undisputed area where not only are the incriminatory statements not corroborated, but they are specifically disproved by the prosecution.

The Court of Appeals herein found sufficient corroboration, by announcing that such corroboration must amount to "independent evidence of the corpus delecti," and finding

> "The evidence clearly shows losses by the bank from embezzlement at the times and in the amounts charged in the indictment."

That this finding was unjustified is shown by the testimony of respondent's witness Eastland to the effect that all the evidence except the confession was as consistent with innocence as guilt (T. 243, 258, 267-271, 275).

Furthermore, the single test of "independent evidence of corpus delecti" is insufficient under the holdings of this Court in Smith v. United States, 348 U.S. 147, 75 S.Ct. 194 (1954); Opper v. United States, 348 U.S. 84, 75 S.Ct. 158 (1954); and Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). The "corpus delecti" rule of Wong Sun (371 U.S. at 489, 83 S.Ct. at 418, fn. 15) was apparently the sole test applied by the Court of Appeals herein (incorrectly). However the rule of Opper, that the independent evidence must "tend to establish the trustworthiness of the statement" (348 U.S. at 93, 75 S.Ct. at 164), was obviously not applied herein, since the independent evidence not only did not tend to establish the trustworthiness of the statements, but substantially established their untrustworthiness and falsity. Additionally, the test of Smith, that "All elements of the offense must be established by independent evidence or corroborated admission..." (348 U.S. at 156, 75 S.Ct. at 199) was not met.

Thus, the finding of sufficient corroboration herein is in conflict with the decisions of this Court.

IV. Exculpatory statements.

This issue is an important question of federal law which has not been, but should be,

settled by this Court.

Under three separate analyses, respondent or its witnesses established certain uncontroverted exculpatory matter, all and each of which is binding upon respondent and, therefore, dictates reversal of the conviction herein.

First, as discussed supra, the uncontroverted documentary evidence introduced by respondent proved that if petitioner caused the shortages and irregularities charged in the indictment, he would have had to remove cash. However, Agent Carlton testified that petitioner said he never removed cash from the Bank (T. 540, 560). This exculpatory statement is not only uncontradicted, but is buttressed by portions of the written confessions, which infer that petitioner caused shortages only by making unsupported deposits to his accounts.

Second, and closely related, petitioner's purported confessions and admissions state that every time he caused a shortage, there would be a corresponding unsupported entry in his accounts. However, on not one of the occasions charged in the indictment did this occur.

Third, if petitioner caused a shortage by the method he confessed to, the resulting book entries would have correctly reflected the transaction, although it was fraudulent. Conversely, the alleged false entries could not have been his, since they did not reflect the purported fraudulent transactions he confessed to. According to his purported confessions, the result of the entries petitioner made to conceal the transaction would be that the General Ledger control account

("Deposits Subject To Checks") would be correct, and the individual ledger accounts would be too high. The evidence, however, showed that if any irregularity existed, said General Ledger account was too low, and the individual ledger accounts correct. Thus, petitioner could not, according to said exculpatory matter, have committed the alleged crimes charged in the indictment. (This is equally applicable to the embezzlement counts since respondent contended that whoever was responsible for the false entries was also responsible for the embezzlements.) Also, various testimony of Mr. Eastland was exculpatory, particularly as to his inability to recognize petitioner's handwriting on the proof sheet changes (although he could recognize petitioner's handwriting elsewhere) and the occurrences at the vault on April 5, 1965, where it appears unlikely that petitioner entered the vault to make the questionable changes.

In the instant cause, the Court of Appeals did not respond to this contention of petitioner, nor was such contention responded to by respondent in its brief in the Court of Appeals. Petitioner was unable to find any relevant decision of this Court on this important issue. However, several cases from the Courts of Appeals indicate that petitioner is entitled to reversal herein because in the absence of contradiction or mistake, the prosecution is bound by exculpatory matter which it introduces, or which its witnesses testify to.

In Cartello v. United States, 93 F. 2d 412 (8th Cir. 1937), a case very similar to the instant cause, a conviction for conspiracy to alter election ballots was reversed due to the insufficiency of evidence, and uncontradicted exculpatory matter testified to by the government witnesses. In that

case, the prosecution proved that thirty or more "straight" Republican ballots had been altered to straight Democratic ballots by someone. The defendants were four election officials and the Democratic precinct captain, all of whom were entitled to be present at the balloting and counting. (Similarly, petitioner's presence in the Bank was authorized and proper.) However, there was no direct evidence that the defendants did the altering. The handwritten alterations were not recognized as the defendants'. (Mr. Eastland testified that although he could recognize petitioner's handwriting in the cash journal, he could not recognize the alterations on the proof recap as petitioner's.) Furthermore, two prosecution witnesses testified that although they observed the defendants during the time in question, they saw no irregularities occur. (Eastland's testimony as to April 6, 1965 is almost identical. Further, all the Bank's employees testified they never saw petitioner do anything improper.) Thus, as in the case at bar, the prosecution had proved at most that a crime occurred, and the defendants had the opportunity to commit the same, as did others. This was insufficient to sustain the conviction. As to the exculpatory matter, the Court said:

> "Ordinarily, a litigant is bound by the testimony of his own witnesses, especially if that testimony is uncontradicted and there is no claim of mistake. (citing cases): (93 F. 2d at 415)

See also Young v. United States, 97 F. 2d 200, 117 A. L. R. 316 (5th Cir. 1935); State v. Hernandez, 36 N. M. 35, 7 P. 2d 930 (1931), ("Where the written statement of one charged

with murder was used against him and showed that he was present, but did not aid and abet, and no circumstance is inconsistent with the exculpatory statement, the conviction must be reversed for failure of essential proof."); State v. Griggs, 20 N.M. 466, 150 Pac. 921 (1915); State v. Butler, 38 N.M. 453, 34 P.2d 1100 (1934), ("...the State having introduced an incriminatory statement, is bound to overcome the exculpatory matter contained in it."). In People v. Collins, 11 Cal. Rptr. 504 (1961) a conviction of voluntary manslaughter was reversed on the basis that the defendant's exculpatory statement was not rebutted by the prosecution. The court said:

> "The prosecution, having presented as a part of its case the statement of defendant as to how the killing occurred, is bound by that evidence in the absence of proof to the contrary." (11 Cal. Rptr. at 515)

In summary, in addition to introducing no substantial proof that petitioner committed the crimes charged in the indictment, respondent's witnesses testified to certain facts which are totally inconsistent with petitioner's guilt, and, if true, exonerate petitioner of the purported crimes charged. These facts not being controverted by respondent, and there being no claim of mistake, respondent is bound by said facts, and reversal is, therefore, required.

CONCLUSION

For the reasons hereinabove stated, this

Court should grant its Writ of Certiorari in this cause.

Respectfully submitted,

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APPENDIX A

OPINION OF TENTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

July Term, 1966

NAPOLEON PERSONE ZAMORA,	)	
	)	
Appellant,	)	
	)	No.
v.	)	8750
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

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Before JONES*, LEWIS and BREITENSTEIN, Circuit Judges.

JONES, Circuit Judge

Napoleon Persone Zamora, the appellant, seeks a reversal of his conviction and sentence upon a jury verdict of guilty on each of eight counts of an indictment charging the making of false entries in the records of a bank insured by the Federal Deposit Insurance Corporation in violation of 18 U.S.C.A. §1005, and on each of three counts of the indictment charging embezzlement of stated amounts from an insured bank by an officer of the bank in violation of 18 U.S.C.A. §656.

The executive vice president of the First National Bank of Santa Rosa, New Mexico, R. W. Eastland, on April 5, 1965, discovered that some false entries had been made in the bank's records. On the following day he discovered that a change in a record had been made that morning. The Federal Bureau of Investigation was called in. On April 8th three F.B.I. agents were at the bank when Zamora returned from lunch shortly after two o'clock. Zamora had been employed by the bank for nineteen years and was then cashier of the bank.

*Of the Fifth Circuit, sitting by designation.

Zamora was asked to go into the bank lounge and there met the F. B. I. agents. Agent Carlton, who was taking the lead at the time, introduced himself and the other agents. He told Zamora that they were investigating a report of irregularities at the bank. Zamora was informed that he did not have to say anything, and that whatever he might say could be used against him. He was told that he could consult a lawyer or anyone else and that no promises would be made and no threats or duress would be used. Zamora consented to answer questions. At the outset Zamora denied having any knowledge of irregularities, but later admitted his embezzlement of bank funds, specified the amount of the total shortage, asserted that no one else was involved, and related the method used to conceal the frauds. The interview lasted less than an hour. The agents went with Zamora to his home where he talked with his wife and made a telephone call to his brother. As he was leaving the bank Zamora said to Eastland, "Walt, I'm sorry. I'm awfully sorry. This is awful. Would you look after my family." The agents took Zamora to the nearest United States Commissioner who was located at Tucumcari, New Mexico, fifty to sixty miles away. About six o'clock a complaint was filed and Zamora made a formal appearance before the Commissioner. The Commissioner asked if he had an attorney. Zamora replied, "No I don't, I don't want one. I have done everything I can do to anybody." The Commissioner, who had known Zamora for a long time, took him into his office and told him he needed a good lawyer. Zamora telephoned his wife from the Commissioner's office. Statements in the nature of confessions had been written by the F. B. I. agents. These were read by Zamora and were read to him, and then were

signed by him.

Zamora was indicted on eleven counts, of which eight counts charged false entries in the records of an F. D. I. C. insured bank, and three counts charged embezzlement from the bank. He was found guilty on all counts and given sentences which aggregate twenty years. He has appealed from the conviction and sentence.

Zamora urges, on several grounds, that the admission of his confession was error. He asserts that the evidence shows that the confession was not freely and voluntarily made. To support this position he points to testimony that he appeared to be dejected, upset, worried, surprised, depressed, and in a state of shock. The witness who used the term "state of shock" regarded it as synonymous with "depressed." None of the evidence, however, indicated the absence of a rational intellect, or any mental condition except that which would naturally follow detection of criminal offenses over a twelve year period involving over $250,000. The evidence falls far short of showing facts from which it could be inferred that the mental condition of the appellant was such as caused his confession to be involuntary, nor was anything else shown which would indicate that the confession was not freely and voluntarily made.

It is claimed by Zamora that his confessions were elicited and taken in violation of his right to counsel. It is conceded, as it must be, that before he was interviewed he was informed that he did not have to make a statement, that anything he might say could be used against him, and that he had a right to confer with an attorney

or with anyone else. When he was before the United States Commissioner he was again informed of his right to counsel. His complaint seems to be that he was not warned more often, told that he could confer with counsel in private, and that he was not advised as to the punishment to which he might be subjected. The applicable constitutional tests were met. In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, it was held that a person in custody must, prior to interrogation, be clearly informed that he has a right to remain silent and that anything he says may be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that if he is indigent a lawyer will be appointed to represent him. The requirements that the person be informed of the right to have his lawyer with him and that a lawyer would be appointed for him, if indigent, are guidelines which had not been announced prior to the Miranda decision. These guidelines are not to be applied to a case where, as here, the trial was commenced prior to the Miranda decision. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882. The Miranda decision was announced on June 13, 1966. The Zamora trial commenced on August 10, 1965, and ended on August 13, 1965. On August 27, 1965, a Motion for Acquittal or for a New Trial was argued and on September 3, 1965, sentence was imposed. The confessions were not to be excluded because of failure to inform Zamora of his rights. We are cited to no authority which requires a person to be informed of the possible penalties of offenses which the questioner may believe have been committed.

The questioning commenced at 2:18 P.M. on the afternoon of April 8, 1965. It terminated about an hour later. Zamora went home and talked with his wife. He telephoned his brother. Zamora and the agents returned to the bank. An F.B.I. agent telephoned the United States Commissioner at Tucumcari, New Mexico. About four o'clock, perhaps a little earlier, Zamora and the agents started from Santa Rosa by automobile and arrived at the Commissioner's office in Tucumcari at 5:20. A complaint was prepared and at 5:26 the arraignment of Zamora commenced. It is urged that the confessions were inadmissible because there was an undue delay in taking Zamora before a commissioner. The duty of the officers is to take a person arrested before a commissioner without unnecessary delay. Rule 5(a) Fed. Rules Crim. Proc., 18 U.S.C.A. This Court, in an opinion stating the governing principles of law with a full discussion of the controlling precedents, has set forth fully and adequately the rules which control the decision on this point in this appeal. Walton v. United States, 10th Cir. 1964, 334 F.2d 343, cert. den. 379 U.S. 991, 85 S.Ct. 706, 707, 13 L.Ed. 2d 612. Applying those rules, it is clear that there was no unnecessary delay shown and the time lapse between the questioning and confession and the arraignment did not render the confessions inadmissible. See also Haier v. United States, 10th Cir. 1966, 357 F.2d 336; Stille v. United States, 10th Cir. 1965, 354 F.2d 233; Shultz v. United States, 10th Cir. 1965, 351 F.2d 287.

This Court is asked to hold that the written confessions, signed by Zamora after he was arraigned, were inadmissible. This position is based upon the assumption that the written

confessions were the same as those made orally at an earlier hour, and that the exclusion of oral statements would require the rejection of those which were written. When the Court holds, as we do, that the oral confessions were properly received in evidence, the plausibility of the appellant's contention disappears.

The appellant insists that there is no sufficient corroboration of his confessions to permit the conviction to stand. It is well settled that unless corroborated by independent evidence of the corpus delicti, the confessions or extrajudicial admissions of a defendant are not sufficient to sustain a conviction. But the independent evidence is only required to be corroboration. It need not be of itself sufficient to establish guilt. It needs only to show facts in corroboration which, taken with the confession, establish guilt beyond a reasonable doubt. Evans v. United States, 10th Cir. 1941, 122 F.2d 461, cert.den. 314 U.S. 698, 62 S.Ct. 478, 86 L.Ed. 558. The evidence clearly showed losses by the bank from embezzlement at the times and in the amounts charged in the indictment. It was also shown by evidence, largely circumstantial but sufficient to permit a determination beyond a reasonable doubt, that the offenses charged were committed by the appellant. No more is required. The evidence sustains the conviction.

Zamora asserts that error was committed by the admission of other offenses than those for which he was being tried. This evidence was of other acts of embezzlement in the course of conduct showing a series of related transactions which diverted funds of the bank to Zamora or to business enterprises of which he was the owner or in which he was substantially interested. Such

evidence was clearly admissible. The rule which guides decision in such a case has been stated with clarity and brevity by this Court in these words:

> "The general rule is that evidence that the accused committed another crime independent of and unconnected with the one for which he is on trial is inadmissible. However, the general rule is subject to a number of well-recognized exceptions. Evidence of another crime is admissible where it tends to establish a common scheme, plan, system, design, or course of conduct and where such other crime is so related to the crime charged that it tends to establish the latter, or tends to establish motive, intent, or absence of mistake or accident." Tandberg-Hanssen v. United States, 10th Cir. 1960, 284 F. 2d 331. See Morgan v. United States, 10th Cir. 1966, 355 F. 2d 43; Caldwell v. United States, 10th Cir. 1929, 36 F. 2d 742, cert. den. 281 U.S. 725, 50 S. Ct. 239, 74 L. Ed. 1143.

There is no merit in the assertion that evidence of other crimes was improperly admitted.

The appellant requested an instruction, which the court refused to give, which would have made a distinction between "moneys" and "funds and credits", contending that if anything was embezzled from the bank it was money and not funds and credits. The court's refusal to give the instruction was proper. The word "funds" is broader than but in its usual sense includes "moneys." In re Pilch's Estate, 141 Colo. 425, 348 P. 2d 706. See Bishop v. United States, 8th Cir.

1926, 16 F. 2d 406, 19 F. 2d 222. The appellant requested an instruction that the bank's deposits were insured at the time in question. The court declined to give the instruction and the refusal is assigned as error. The indictment charged false entries in the records of an insured bank and proof was required that the bank was insured. The evidence showed that a certificate of insurance was issued to the bank in 1950 and was still in force at the time of the trial. The requested instruction was unnecessary and might have confused the jury.

The appellant attacks the sufficiency of the evidence. This contention has been considered and does not require extended discussion. The appellant was fairly tried and the evidence fully warranted the verdict and judgment. No error has been made to appear. The judgment and sentence of the court is

AFFIRMED.